



**Westchester County Round-Up:
Recent Significant Decisions from the
Westchester Federal and State Courts
June 2014**

*This article is the third in a quarterly series reviewing decisions from the Federal District Court and State Supreme Court (Commercial Division) judges located in White Plains.
This article reviews decisions from the second quarter of 2014.*

Judge Karas Refuses to Dismiss Portions of Indictment against State Politicians

In *United States v. Smith*, 2014 WL 2025994 (S.D.N.Y. Apr. 4, 2014), Judge Kenneth M. Karas refused to dismiss portions of an indictment alleging numerous corruption-related counts against New York State Senator Malcolm Smith and two New York City politicians arising out of the attempt to place Smith, a Democrat, on the ballot for New York City's Republican mayoral primary in 2013. The case has had several twists and turns and has attracted significant media attention. Among the counts addressed in the Court's lengthy opinion, Judge Karas upheld those brought under the Travel Act and the Honest Services Fraud Statute. With respect to the Travel Act, Defendants argued that a violation of the New York state statute underlying the Travel Act counts could not have occurred on the facts alleged in the indictment because the relevant individuals did not have the power, and so could not have agreed, to designate Smith as a candidate for the Republican mayoral primary. The Court acknowledged the lack of case law interpreting the underlying statute and engaged in an in-depth discussion of that law. It concluded that the government had sufficiently alleged the predicate state offense based on allegations that Defendants made or accepted offers that increased the likelihood or probability Smith would be designated as a candidate for the primary. The Court also rejected the contention that the Honest Services Fraud Statute was unconstitutionally void for vagueness as applied to defendant Vincent Tabone, a Queens Republican Party official, because he did not have fair warning that his acts might violate a penal statute. Explaining that "honest services wire fraud" requires the violation of a fiduciary duty, the Court held that a person of ordinary intelligence should have been on notice that Tabone owed a fiduciary duty to his county committee and members of the Republican Party under state, federal or common law. Finally, while the Court rejected Smith's request to strike prejudicial surplusage from the indictment, it did so without prejudice to renewal before trial.

Judge Romàn Holds Plaintiff Stated a Legally Cognizable Claim for Violations of the Anti-Retaliation and Whistleblower Protection Provisions of the Sarbanes-Oxley and Dodd-Frank Acts

In *Yang v. Navigators Group, Inc.*, 2014 WL 1870802 (S.D.N.Y. May 8, 2014), Judge Nelson S. Romàn denied Defendant's motion for judgment on the pleadings on Plaintiff's claims under the anti-retaliation provision of the Sarbanes-Oxley Act ("SOX") and the whistleblower protection provision of the Dodd-Frank Act ("DFA"). The Court further held that amendment of the Complaint would not be futile and thus permitted Plaintiff to amend her complaint. The Court explained it did not need to decide whether Plaintiff's communications to her superiors "definitively and specifically" related to one of the listed categories of fraud or securities violations under SOX, because, as a threshold matter, Plaintiff did not have to communicate to her employer which laws were allegedly violated. The Court further rejected Defendant's argument that Plaintiff was not a "whistleblower" under the DFA, holding that "whistleblower" includes an individual who reports to governmental authorities other than the SEC.

Judge Briccetti Holds Pro Se Plaintiff Plausibly Alleged Westchester County and Individual Employees Violated His Right to Free Exercise of Religion

In *George v. County of Westchester*, 2014 WL 1508612 (S.D.N.Y. Apr. 10, 2014), Judge Vincent L. Briccetti granted in part and denied in part Defendants' motion to dismiss Plaintiff's complaint alleging violations of the Free Exercise Clause. Plaintiff, a Jewish former detainee at the Westchester County Jail, alleged that Defendants denied his repeated requests to attend and congregate religious services and prevented him from following a kosher diet. The Court explained that its role was not to question the validity of a litigant's interpretation of a creed, but rather to determine whether the litigant's beliefs were sincere and religious in nature. It went on to find that Plaintiff's beliefs were both sincere and religious and that he had plausibly alleged Defendants substantially burdened his right to free exercise. The Court further held that Defendants had not offered a legitimate penological reason for restricting Plaintiff's free exercise. Separately, the Court held that Plaintiff stated a plausible "Monell claim" against Westchester County - a difficult claim to sustain as it imposes liability on local government for a violation of constitutional rights only if the injury is caused by the execution of a municipal policy or custom. The Court explained that although the County had a constitutional policy regarding the right of detainees to congregate for religious worship, documents indicated that, in practice, the County did not allow Jewish inmates to so congregate.

Judge Seibel Grants Summary Judgment for College Campus Police Officers Against False Arrest and Malicious Prosecution Claims

In *Costello v. Milano*, 2014 WL 1794886 (S.D.N.Y. May 6, 2014), Plaintiff filed a lawsuit against college campus police officers under 42 U.S.C. § 1983, alleging false arrest and malicious prosecution arising out of Plaintiff's arrest for operating a motor vehicle while impaired and unlawful possession of marijuana. Judge Cathy Seibel granted summary judgment in favor of the defendant officers, holding probable cause was a complete defense to both claims. In particular, the

Court concluded that even though the car was not moving at the time of the arrest, a reasonable officer could infer that Plaintiff had recently driven the car. The Court further noted that while mere proximity to contraband is insufficient to support a finding of constructive possession, there was probable cause that Plaintiff possessed marijuana because a marijuana cigar was found in the center console of the car and additional marijuana and related paraphernalia were found under the driver's seat.

Justice Scheinkman Grants Summary Judgment for Underwriter On Fraud Claim, but Grants Insurer Leave to File Amended Complaint Asserting Related Theories for Recovery

In *MBIA Ins. Corp. v. J.P. Morgan Sec., LLC*, 43 Misc.3d 1221(A), (N.Y. Sup. Ct. May 6, 2014), Justice Alan D. Scheinkman (Westchester's only Commercial Division judge) granted summary judgment in favor of the defendant underwriter J.P. Morgan Securities, LLC on the plaintiff insurer's fraud claim. In its Complaint, Plaintiff asserted that Defendant, through the submission of altered due diligence information, intentionally misrepresented material facts that Plaintiff relied upon to its detriment. The Court held that summary judgment was proper because, although it could not conclude as a matter of law that the due diligence results were immaterial, there was no evidence that anyone at Plaintiff's firm read or relied on the due diligence information Defendant submitted. More specifically, the Court concluded that Plaintiff's submission of its employee's allegedly routine practice of reviewing due diligence information was not specific enough to create a triable issue of fact. At the same time, the Court permitted Plaintiff to file an amended complaint to allege unpleaded theories of recovery asserted for the first time in opposition to summary judgment.

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Contact us at 140 Grand Street, Suite 501, White Plains, NY 10601
(914) 686-1500
www.yankwitt.com